

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

ROBERT ORLANDO LOVE,

Plaintiff,

CASE NO. 1:14cv281

v.

HON. ROBERT J. JONKER

SHANIEKA DEVONNE MOSLEY  
and DAVID SHARP,

Defendant(s).

**ORDER MODIFYING AND APPROVING  
REPORT AND RECOMMENDATION**

This is a prisoner civil rights action alleging that Defendants violated Plaintiff's constitutional rights while he was on parole. Plaintiff alleges that Defendant Sharp used excessive force against him. Defendant Sharp has moved for summary judgment (docket # 12) and Plaintiff has responded with a motion to stay (docket # 23), a second amended complaint (docket # 27), and a motion for leave to file a third amended complaint (docket # 40). Plaintiff has also asserted constitutional claims against Defendant Mosley that are not at issue in the Magistrate Judge's Report and Recommendation. Defendants Michigan Department of Corrections ("MDOC") and the State of Michigan have not been served and the Magistrate Judge recommends their dismissal, *sua sponte*, to which Plaintiff does not object.

The Court has reviewed the Report and Recommendation issued by the Magistrate Judge in this matter (docket # 45) and Plaintiff's Objections to the Report and Recommendation (docket # 49). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she

finds it justified.” 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the Report and Recommendation itself; and Plaintiff's objections. After its review, the Court finds that the Report and Recommendation is factually sound and legally correct. The Court agrees with the conclusions stated by the Magistrate Judge. The Court does, however, believe that Plaintiff must be given leave to amend his complaint and assert a *Bivens* claim against Defendant Sharp.

In Objection No. 1, the Plaintiff primarily reiterates and expands arguments made in his motion papers. Although it is undisputed that Mr. Sharp was an investigator for MDOC, it is also undisputed that Mr. Sharp was, at the relevant times, a Special United States Deputy Marshal. The United States Attorney for the Western District of Michigan has certified that Mr. Sharp was acting within the scope of his federal detail. The Report and Recommendation already carefully, thoroughly, and accurately addresses these arguments. The Court does, however, agree with the Plaintiff that he should have the opportunity to amend his complaint to bring a claim against Defendant Sharp pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Defendant may then address any newly

pleaded claim with appropriate motion practice. The Plaintiff shall have thirty days to file an amended complaint, if he wishes.

In Objection No. 2, the Plaintiff requests that the Court consider his objections despite a late filing after a motion for an extension of time (docket # 46) was denied (docket # 48). The Court has considered the objections.

**ACCORDINGLY, IT IS ORDERED** that the Report and Recommendation of the Magistrate Judge (docket # 45) is adopted, with the proviso that Plaintiff may file an amended complaint within 30 days that asserts a *Bivens* claim against Defendant Sharp.

**IT IS FURTHER ORDERED** that Plaintiff's claims against Defendants MDOC and the State of Michigan are **DISMISSED** pursuant to 28 U.S.C. §1915(e)(2)(B)(ii), for reasons recited by the Magistrate Judge, to which Plaintiff has not objected.

**IT IS FURTHER ORDERED** that Plaintiff's motion to stay (docket no. 23) is **DENIED**.

**IT IS FURTHER ORDERED** that Defendant Sharp's combined motion to dismiss and for summary judgment (docket no. 12) is **GRANTED**, subject to Plaintiff's opportunity to file an amended complaint within 30 days.

**IT IS FURTHER ORDERED** that Plaintiff's second amended complaint (docket no. 27) is **STRICKEN**, and Plaintiff's motion for leave to file a third amended complaint (docket no. 40) is **DENIED** as futile; provided, however, that Plaintiff may file an amended complaint asserting a *Bivens* action against Defendant Sharp within 30 days.

/s/Robert J. Jonker  
Robert J. Jonker  
Chief United States District Judge

Dated: September 30, 2015